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No. 93-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: APPLICATION OF
SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN,
AND EDWARD FODEN,

Petitioners,

—v.—

SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 30, 1993

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err in holding — in conflict with the First, Third, Eleventh and D.C. Circuits — that foreign litigants may obtain discovery pursuant to 28 U.S.C. § 1782 for use in a foreign proceeding even though the discovery sought would not be available to them under the laws of their own jurisdiction?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: APPLICATION OF
SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN,
AND EDWARD FODEN,

Petitioners,

-v-

SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Maria Luisa De Castro Foden and Edward Foden respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on August 20, 1993.

OPINIONS BELOW

The opinion of the Second Circuit, which is not yet reported, is reprinted in the appendix hereto, at pages A1 through A19. The decision of the United States District Court for the District of Connecticut was read into the record after oral argument on March 8, 1993 and is not reported. It is reprinted in the appendix hereto at pages A20 through A24.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1782.

STATUTE INVOLVED

28 U.S.C. § 1782(a) provides in full:

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the

international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."

STATEMENT OF THE CASE

This petition presents a question of importance to the foreign relations of the United States, to the federal court system and to individuals and businesses in the United States who may be parties or witnesses in foreign litigation. The question is whether 28 U.S.C. § 1782 requires that our system of expansive compulsory discovery be made available to litigants in a foreign proceeding when the procedures and practices of the judicial system governing the foreign proceeding provide them no such rights and powers.

The Second Circuit's decision below creates a clear conflict among the circuits on this issue. Until the present decision, each Court of Appeals that had addressed the issue — the First, Third, Eleventh and District of Columbia Circuits — had imposed or recognized a requirement that to obtain discovery in the United States under 28 U.S.C. § 1782, applicants must show that the discovery they seek would have been available to them in the foreign proceeding

if the documents or witness in question were found within that jurisdiction. [1]

The Second Circuit's express rejection of this authority and of the discoverability requirement is based on an incorrect construction of the statute and is contrary both to its legislative history and to the established principle that § 1782 was intended to give foreign litigants the opportunity to obtain from U.S. witnesses whatever kinds of information they could obtain within their own country — *but not more*.

Permitting one side in a foreign litigation to obtain discovery because of the happenstance that the witnesses or documents it seeks are located in the United States will upset the balance between litigating parties that each nation creates within its own judicial system and impose U.S. procedures capriciously on some but not all parties to the foreign proceeding. This intrusion into a foreign adjudicatory system will inevitably be offensive to foreign sovereigns, and will therefore undermine the statute's ultimate purpose of encouraging foreign countries to cooperate in providing discovery for use in litigation in the United States. It will also unfairly disadvantage U.S. litigants in foreign proceedings by requiring that they alone among the parties litigant provide discovery in a system that recognizes no such obligation.

The conflict among the circuits on the issue is not merely a theoretical inconsistency in federal jurisprudence. It is a

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[1] *In Re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992); *In Re Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 692 n.7 (D.C. Cir. 1989); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); *In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar* v. *Ministry of Affairs of Trinidad and Tobago*, 488 U.S. 1005 (1989); *John Deere, Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985).

practical impediment to consistent and orderly response to international litigants seeking to use our courts to obtain the tactical advantage of American-style discovery for one side or the other in proceedings that were intended to give neither side such an opportunity. Unless the fortuity of residence in the Second Circuit of a witness or party to a foreign litigation is to affect substantively the rights of both U.S. citizens and foreign litigants, this conflict should be resolved. As in *Banco Nacional de Cuba* v. *Sabbatino*, this Court should grant certiorari "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." 376 U.S. 398, 407 (1964).

FACTUAL BACKGROUND

As set out in the Second Circuit's decision at A3-A6, the proceedings below arose out of an application by respondents Silvia Gianoli Aldunate and José Miguel Barriga Gianoli to the United States District Court for the District of Connecticut for an order pursuant to § 1782 granting them discovery from petitioners Maria Luisa Foden and Edward Foden.

In May 1992, respondents had been appointed provisional guardians of the property of Ciro Gianoli in a Chilean incompetency proceeding. Ciro Gianoli (now age eighty-six), is a citizen of both Uruguay and Chile. Respondent Silvia Gianoli Aldunate is one of Mr. Gianoli's daughters; respondent José Miguel Barriga Gianoli is Mr. Gianoli's grandson. Mr. Gianoli and his first wife, Elena Aldunate, have been separated for decades, but because of strictures of Chilean law have never divorced. Mr. Gianoli has had various disputes with the children and grandchildren of his first marriage and has been estranged from them for years.

On September 18, 1980, Mr. Gianoli and Ana Eguiguren (now age seventy), whom Mr. Gianoli has known since

approximately 1949, participated in a marriage ceremony in Montevideo, Uruguay. Mrs. Eguiguren and Mr. Gianoli had established a relationship as a couple approximately four years before the ceremony and have lived together as husband and wife ever since. Mrs. Eguiguren is one of the two court-appointed provisional guardians of Mr. Gianoli's person.

Petitioner Maria Luisa Foden is Mrs. Eguiguren's daughter. She and her husband, petitioner Edward Foden, reside in Hartford, Connecticut and are U.S. citizens.

THE PROCEEDINGS BELOW

On October 27, 1992, respondents applied to the district court *ex parte* to obtain discovery from petitioners pursuant to § 1782, allegedly for use in compiling an inventory of Mr. Gianoli's assets in the incompetency proceeding in Chile.

On November 16, 1992, the district court granted the application and issued subpoenas to petitioners. On January 8, 1993, petitioners moved to vacate the court's order and to quash the subpoenas on the ground, among others, that respondents had failed to make the threshold showing required by § 1782 that the discovery sought would be available to them under Chilean law.

On March 8, 1993, the district court denied petitioners' motion, rejecting the principle that under § 1782 information sought must be discoverable in the foreign jurisdiction. (A22-A23.)

On appeal, the Second Circuit affirmed the district court, holding that "section 1782 does not contain a requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction." (A18-A19.) The court stated that this result was consistent with what it characterized as "unambiguous" statutory language. (A11.)

The Second Circuit expressly recognized that it was creating a conflict among the circuits, stating, for example, "[t]he Fodens cite First and Eleventh Circuit decisions that explicitly read a discoverability requirement into § 1782 and argue that the reasoning in those decisions is persuasive [citing *Asta Medica*; *Lo Ka Chun*; *Trinidad and Tobago*, *supra*]. *We disagree.*" (A13 (footnote omitted; emphasis added).)

The Second Circuit also noted that "the district court did not make a finding as to the parties' ability to obtain pre-trial discovery under Chilean law . . . ." (A17.)[2]

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit's Rejection of the Discoverability Requirement Creates a Clear Conflict Among the Courts of Appeals.

The Courts of Appeals for the First, Third, Eleventh and District of Columbia Circuits have all imposed or recognized the requirement that to be discoverable under § 1782 information must be discoverable in the applicable foreign jurisdiction. The Second Circuit is the first appellate court to diverge from this consistent series of holdings.

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[2] If a discoverability requirement is now recognized, the case should be remanded to the district court with instructions to determine whether Chilean law permits the proposed discovery. The parties have stipulated to a stay of discovery until the sooner of this Court's issuance of a decision on this petition or November 30, 1993. If the Court issues a writ of certiorari, the stay will continue.

Most recently, the First Circuit held that

> "a litigant requesting assistance under Section 1782 has to show that the information sought in the United States would be discoverable under foreign law."

In Re Application of Asta Medica, S.A., 981 F.2d 1, 7 (1st Cir. 1992). The court emphasized that the lack of such a requirement not only would enable a litigant in purely foreign litigation to gain an unfair advantage over its adversary, "but more importantly, foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Id.* at 6.

The Eleventh Circuit also has expressly imposed this prerequisite in two separate cases in which foreign litigants sought discovery under § 1782 for use in a foreign proceeding. *See In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar* v. *Minister of Legal Affairs of Trinidad and Tobago*, 488 U.S. 1005 (1989) (". . . the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance"); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988) (case remanded "for a determination as to the discoverability of the evidence sought by appellee Lo To" in foreign country).

Similarly, the Third Circuit, in *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985), held that "[a] grant of discovery that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782." *Id.* at 135. The court went on to state:

> "Our decision does not countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals. Concern that foreign discovery provisions not be circumvented by procedures authorized in American

courts is particularly pronounced where a request for assistance issues not from letters rogatory, but from an individual litigant."

Id. at 136.[3]

While the Second Circuit stated that *John Deere* "was not a case about whether section 1782 requires discoverability" (A14), the Third Circuit plainly recognized the importance of the discoverability requirement, particularly when (as here) the § 1782 applicant is not a foreign tribunal or governmental authority, but merely a private litigant. In fact, the Third Circuit found that use of § 1782 was proper in the case before it *expressly* because of its finding that "the testimony sought would generally be subject to discovery were all the parties in Canada." 754 F.2d at 136. Any perceived ambiguity in the Third Circuit decision simply exacerbates the division among the circuits and underscores the need for resolution of the issue by this Court.

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[3] The District of Columbia Circuit has also recognized the discoverability requirement. *See In Re Request from Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 687, 692, n. 7 (D.C. Cir. 1989) (quoting *Trinidad and Tobago, supra*, and *John Deere, supra*).

II.

Discovery Should Be Permitted Under § 1782 Only If It Would Be Permitted In the Underlying Foreign Litigation.

A. Section 1782 Should Be Construed to Include a Discoverability Requirement In Order to Prevent the Law from Being Used for Purposes Congress Never Intended.

Although the Second Circuit describes the language of § 1782 as "unambiguous," every other circuit construing it has recognized the discoverability requirement that the Second Circuit could not discern.

The Second Circuit held that because the text of § 1782 does not explicitly set out a discoverability requirement, no such requirement can exist. As shown below, however, the relevant language of § 1782 is by no means clear and, to permit practical application, must be interpreted in light of its history and purposes and in accord with public policy. *See Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" (citations omitted)).

Read literally, the requirement of § 1782 that the testimony or documents sought be "for *use in* a proceeding in a foreign or international tribunal" (emphasis added) appears directed not to discovery, but to the production of admissible evidence that will actually be *used* (*i.e.*, put in evidence) in the foreign proceeding. The word "discovery" — with its connotation of pretrial information-gathering — does not even appear in the statute. If Congress had wished, it could easily have used the word "discovery," or could have provided

more broadly for production of information "in connection with" or "in aid of" (rather than simply "for use in") the foreign proceeding. Such language would have established more clearly that Congress intended to permit American-style discovery. Indeed, it is not the language of the statute but judicial interpretation of the legislative history and Congressional intent that has led courts to construe Section 1782 broadly to permit discovery rather than only the collection of admissible evidence. *See, e.g., John Deere, supra*, 754 F.2d at 136-37; *Trinidad and Tobago, supra*, 848 F.2d at 1156.

Petitioners do not take issue with this liberal interpretation of Section 1782 as a discovery statute. They submit, however, that because this interpretation necessarily drew upon the history and purposes of the statute, it makes no sense now to rely upon the supposedly "plain meaning" of the statute to require that this implied right to take discovery must be unlimited because there is no express limitation in the words of the statute.

As is shown in Section B below, the Courts of Appeals that have adopted or recognized the discoverability requirement have concluded, after reviewing the legislative history and the purposes of the statute, and rejecting admissibility under foreign law as the appropriate standard, that the best protection against misuse of the law, and the best assurance that the goals of the statute will be fulfilled, is to look to what the foreign court in question would view as legitimate. To adopt any other measure — including U.S. views on the proper scope of discovery — would usurp both the power of foreign courts to organize and control controversies before them and the right of foreign sovereigns to determine for themselves the role pretrial discovery should play in their own systems of justice. *See, e.g., John Deere*, 754 F.2d at 136-37 (rejecting admissibility and stating, "Where, in the first instance, the matter sought would be discoverable were all persons within the foreign jurisdiction, the foreign tribunal

should decide what use it wishes to allow the elicited documents and testimony."); *Asta Medica,* 981 F.2d at 7 (reviewing the statute and legislative history and concluding "Congress . . . intended that the primary burden fall upon the applicant, who has to make a showing that the information is discoverable under foreign law.").[4]

B. The Second Circuit's Decision Defeats the Fundamental Purposes of the Statute and Threatens to Disrupt Trans-Border Litigation And Unduly Burden the Federal Courts.

1. The discoverability requirement is a necessary corollary to the central purpose of § 1782 of encouraging foreign countries to cooperate in providing discovery.

The Court of Appeals for the First Circuit concluded that without a discoverability requirement "foreign litigants may use Section 1782 to circumvent foreign law and procedures" and to obtain greater discovery than foreign law permits. *Asta Medica*, 981 F.2d at 6.

To permit or to facilitate this result would be contrary to a basic purpose of § 1782: the hope "that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." S.

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[4] The discoverability requirement is not the only issue under § 1782 that has required interpretive analysis. For example, the Second Circuit has itself interpreted the unadorned phrase, "for use in a proceeding . . ." — reading into it a requirement that the foreign proceeding must either be pending or "imminent — very likely to occur and very soon to occur," in order to warrant assistance under the statute. *In Re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

Rep. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782 (the "Senate Report") at 3783.

As the First Circuit concluded in *Asta Medica*, to interpret § 1782 to permit discovery in the United States that was not available in the foreign nation

> "would lead some nations to conclude that United States courts view their laws and procedures with contempt. In this manner, the broader goal of the statute — stimulating cooperation in international and foreign litigation — would be defeated since foreign jurisdictions would be reluctant to enact policies similar to Section 1782."

982 F.2d at 7. *See also John Deere*, *supra*, 754 F.2d at 135-36.[5]

The Second Circuit agreed that encouraging foreign cooperation in discovery was a fundamental purpose of § 1782 (A8, A13-A14), but "disagree[d] with the First Circuit's holding that, as a result of these concerns, Congress intended section 1782 to have an implied discoverability requirement." The court stated, "[i]nstead, we believe Congress intended that these concerns be addressed by a

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[5] In rejecting the discoverability requirement, the Second Circuit notes that the text of the statute is silent on the specific subject of discoverability and that § 1782 was amended in 1964 to "liberalize" the procedures for obtaining information. (A8, A12.) The 1964 amendments, however, broadened only the *procedures* for obtaining information — for example, by allowing private litigants to obtain discovery. The amendments did not change the *substance* of what can be obtained. In fact, by allowing private litigants (not just foreign tribunals and governmental litigants) to seek assistance directly, the 1964 amendments increased the importance of the requirement that discovery unavailable under foreign law not be permitted. *See, e.g., John Deere*, 754 F.2d at 136 (quoted *supra* at pp. 8-9).

district judge's exercise of discretion." (A14 (citation omitted).)

This retreat to the discretion of individual judges is simply unworkable and poses great risks for no good purpose. If discoverability is not the rule, there is no standard that can reasonably be substituted. To exercise discretion as the Second Circuit's holding requires, district courts will first have to determine whether the information sought goes beyond what the foreign court would permit in its own system and then address the impossibly amorphous issue of whether what is proposed goes enough beyond the foreign country's procedure to give offense. Deciding how much beyond is too much beyond will be an unguided, ad hoc and dangerous exercise. It also will not eliminate the need for examination of foreign law. Rather, it will complicate the problem by requiring expert testimony not just about discovery, but about theories of sovereignty and judicial philosophy.

No other circuit has found that the threshold issue of discoverability can safely be left to the discretion of the district courts. *See Asta Medica*, 981 F.2d at 7 (the district court's considerable "discretion . . . is limited by the restriction that we find . . . to be implicitly required by section 1782 [the discoverability requirement], based upon its history, rationale, and the policy considerations we have discussed"); *Trinidad and Tobago*, 848 F.2d at 1156 ("the district court *must* decide whether the evidence would be discoverable in the foreign country before granting assistance" (emphasis added)).[6]

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[6] The Second Circuit noted with approval that the district court had found that the discovery sought would "aid" the Chilean court and therefore "'would not be an affront to the Chilean court or the Chilean sovereignty.'" (A18.) The finding that the information sought would (in the view of a U.S. court) be (continued...)

2. Congress did not intend effectively to amend foreign law to the disadvantage of U.S. parties to foreign litigation.

To permit a foreign litigant to obtain broad, U.S.-style discovery without determining whether such discovery would be available in the foreign jurisdiction will also destroy the equitable balance between litigants that each nation creates for its own judicial system. As the First Circuit recognized in *Asta Medica*:

> "Under the district court's ruling, a United States party involved in litigation in a foreign country with limited pre-trial discovery will be placed at a substantial disadvantage vis-a-vis the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction. Congress did not amend Section 1782 to place United States litigants in a more detrimental position than their opponents when litigating abroad. *This result would be contrary to the concept of fair play embodied in United States discovery rules* and the notion that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.' *Societe Nationale*

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[6](...continued)

helpful to the foreign court, however, does not answer the question of whether "foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Asta Medica*, 981 F.2d at 6. Indeed, it seems highly presumptuous for our courts to claim the prescience needed to decide that a Chilean court could not be offended by a U.S. court endowing respondents with powers broader than are given to them by virtue of their appointment in Chile.

Industrielle Aerospatiale v. *U.S. Dist. Court for Southern Dist.*, 482 U.S. 522, 540 n.25. . . ."

981 F.2d at 5-6 (emphasis added).

The legislative history of § 1782 establishes that Congress did not intend to export U.S.-style discovery to other nations. *See* Senate Report at 3788. As the Senate Report also stated (at 3783):

> "Enactment of [Section 1782] will constitute a major step in bringing the United States to the forefront of nations *adjusting their procedures to those of sister nations* and thereby providing *equitable* and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."

(Emphasis added.) The Second Circuit's rejection of the discoverability requirement will lead to the opposite of the intended result: it will unilaterally adjust some, but not all, foreign procedures to ours, thereby imposing procedures on international litigants *inequitably*.[7]

3. The elimination of the discoverability requirement places an undue burden on the district courts.

Eliminating the discoverability requirement amounts to an open invitation to foreign litigants to seek information here to which they are not entitled in their home jurisdiction.

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[7] In recently imposing the discoverability requirement, a California district court recognized the inequity of such a result: "This court does not believe that Congress intended to pass legislation that would significantly weaken the position of United States citizens in foreign legal proceedings." *In Re Application for an Order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England*, 147 F.R.D. 223, 226 (C.D. Cal. 1993).

Given the expanding nature of international commercial litigation — particularly in the Second Circuit — the potential expense and burden of such a rule for U.S. courts and U.S. parties will be substantial, and will produce no commensurate benefit for our citizens or judicial system.

The discoverability requirement, by contrast, places little or no burden on the district court. As the First Circuit stated in *Asta Medica*:

> "Congress . . . intended that the *primary burden fall upon the applicant, who has to make a showing that the information is discoverable under foreign law*. . . . The only burden that would fall upon the district court is to make a discovery determination based upon the submission by the parties. That is hardly an 'onerous' burden."

981 F.2d at 7 (footnotes omitted).

CONCLUSION

Because a large number of international businesses and foreign individuals are located within the Second Circuit, the decision of the Court of Appeals for the Second Circuit will have a more significant (and damaging) impact upon international litigation than is normally the case when a single circuit renders a decision that is inconsistent with the rule of law adopted by other circuits. Unless corrected by this Court, the Second Circuit's decision threatens substantially to undermine the fundamental goals of § 1782 and to encourage a flood of § 1782 applications into already overburdened federal courts without any countervailing benefit to the interests of justice.

Respectfully submitted,

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September 30, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1543 — August Term, 1992
(Argued: May 6, 1993 Decided: August 20, 1993),
Docket No. 93-7215

IN RE: APPLICATION OF SILVIA GIANOLI ALDUNATE, AND JOSE MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN, and EDWARD FODEN,

Appellants,

— against —

SILVIA GIANOLI ALDUNATE, and JOSE MIGUEL BARRIGA GIANOLI,

Appellees.

Before:

MESKILL, PIERCE and WALKER,
Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut, Cabranes, *C.J.*, denying appellants' motion to vacate the district court's order granting discovery against appellants pursuant to 28 U.S.C. § 1782 and to quash discovery subpoenas issued pursuant to that order.

We affirm.

PHILIP L. GRAHAM, JR., New York City (Henry Christensen III, Basil P. Zirinis III, Anthony C. Walsh, Sullivan & Cromwell, New York City, Steven R. Humphrey, Robinson & Cole, Hartford, CT, of counsel), *for Appellants*.

KENNETH A. CARUSO, New York City (Andrew W. Regan, Shearman & Sterling, New York City, James F. Stapleton, Joy Beane, Day, Berry & Howard, Stamford, CT, of counsel), *for Appellees*.

MESKILL, *Circuit Judge*:

This is an expedited appeal from a final order of the United States District Court for the District of Connecticut, Cabranes, *C.J.*, denying the motion of appellants Maria Luisa de Castro Foden and Edward Foden (the Fodens) to vacate the district court's order granting discovery against them pursuant to 28 U.S.C. § 1782 and to quash discovery subpoenas issued pursuant to that order. Appellees Silvia Gianoli Aldunate and Jose Miguel Barriga Gianoli (the Appellees), provisional guardians of the property of Ciro Gianoli Martinez (Ciro) in a Chilean incompetency proceeding, applied *ex parte* to the district court for an order

pursuant to 28 U.S.C. § 1782 granting them discovery from the Fodens concerning Ciro's assets in the United States. Section 1782 provides, in pertinent part, that upon the application of an interested party, the district court of the district in which a person resides or is found may order him to give his testimony or to produce documents for use in a proceeding in a foreign or international tribunal.

The district court granted the Appellees' motion and issued subpoenas against the Fodens. The Fodens moved to vacate the district court's order and quash the subpoenas on the grounds that, *inter alia*, section 1782 requires a threshold showing that the discovery sought in the district court would be available under the laws of the foreign jurisdiction, and that the Appellees had failed to make such a showing. The district court denied the motion, and this appeal followed. For the reasons stated below, we affirm.

BACKGROUND

Ciro Gianoli Martinez, an 86 year old businessman and successful investor, resides in Santiago, Chile. Ciro married Elena Aldunate Lynch in 1935 and had four children, two of whom are still alive. Appellee Silvia Gianoli Aldunate is one of the living daughters and appellee Jose Miguel Barriga Gianoli is the son of one of the deceased daughters. Ciro and his first wife have been separated for decades, but allegedly under Chilean law are unable to obtain a divorce. Thirteen years ago, Ciro participated in a marriage ceremony in Uruguay with Ana Eguiguren Rozas (Ana), age 69, whom he had known for approximately 31 years. Ciro and Ana have lived together since the ceremony. Appellant Maria Luisa de Castro Foden is Ana's daughter and lives with her husband, appellant Edward Foden, in Connecticut.

Ciro's mental health recently deteriorated, prompting all of Ciro's living descendants to commence an incompetency proceeding before the Third Civil Court of Santiago, Chile,

on April 9, 1992. The Fodens and the Appellees give differing accounts of Ciro's relationship with his daughters and Ana and of when his mental health deteriorated. The Fodens claim that Ciro has been estranged from his daughters and grandchildren for years, and that it was Ciro's intention that Ana was to care for him if he became ill. They state that Ciro was in good mental and physical health up until the time of a February 1992 seizure. The Appellees state that Ciro's mental health was good and his contact with his daughters and grandchildren was "consistent and regular" up until about 1989. At that point, according to the affidavits of two medical assistants who attended to Ciro at home, Ana began to isolate Ciro from his family and friends. Ana is accused, for example, of denying Ciro use of the telephone or access to any visitors.

On May 22, 1992, the Third Civil Court provisionally declared Ciro incompetent. The court appointed the Appellees as Ciro's provisional general guardians. Raul Jose Alamos Latelier, Ciro's attorney and business colleague, was also appointed provisional guardian, but "for the sole purpose of assuming direct care of [Ciro], which task he shall carry out jointly with Ana Eguiguren Rozas." The court ordered the provisional guardians that "[i]n due time, a certified inventory of the property of [Ciro] must be conducted." Ana appealed the orders of the civil court, and the Supreme Court of Chile affirmed.

On June 4, 1992, the provisional guardians filed an inventory of Ciro's assets located in Chile with the Third Civil Court. In the inventory, the Appellees stated that Ciro also "possesses considerable property abroad," that they "are not, at present, in a position to give specific details on his assets," but that they are "making investigations and taking other measures to specify the amount and location of the assets located abroad" and will file an expanded inventory.

On October 27, 1992, the Appellees applied *ex parte* to the United States District Court for the District of Connecticut for a discovery order pursuant to 28 U.S.C. § 1782. In support of their application the Appellees submitted the affidavit of George E. Deren, a financial investigator hired by the Appellees' counsel. In the affidavit, Deren describes the background of the incompetency proceeding, and then describes Casabianca Investments S.A. (Casabianca), a holding company founded by Ciro in 1981 through which "considerable" assets were held outside of Chile. Deren states that his investigations revealed that the Fodens became involved with Casabianca in September 1989, when the bank statements of a Casabianca account at Swiss Bank New York began to be mailed in care of Maria Luisa Foden to the address of her Hartford, Connecticut law office. According to the affidavit, beginning in November 1989, millions of dollars passed through the account, and the account was finally closed in September 1990. That same month, Maria Luisa Foden directed that the remaining funds in Casabianca's Daily Dollar Account be wired to a client account of hers in Hartford. Deren states that on July 10, 1990, Edward Foden had become Vice President, Secretary and a member of the board of directors of Casabianca and Maria Luisa Foden had been granted a general power of attorney by Casabianca's president. Finally, Deren states that on March 11, 1991, a meeting of the shareholders of Casabianca was held in Hartford with only the Fodens in attendance. According to the minutes, "[a]ll shares of the company issued and in circulation were present," and the shareholders resolved that Casabianca be dissolved. The Appellees asked the district court to order the Fodens to "provide any documents they have and [to] give testimony concerning the assets of Casabianca, and the current whereabouts of those assets," concluding that "[i]nformation about these assets is relevant to, and will be used in, the guardianship proceeding in the Chilean court, in which the

Guardians must file an inventory of Mr. Gianoli's assets wherever they may be found."

On November 16, 1992, Chief Judge Cabranes granted the Appellees' application and issued subpoenas requiring the Fodens to produce documents and to appear for depositions. On January 8, 1993, the Fodens moved to vacate the order of judicial assistance and to quash the subpoenas. After briefing and oral argument, Chief Judge Cabranes orally denied the motions, holding that (1) all of the requirements of section 1782 had been satisfied, (2) section 1782 does not require that the evidence sought in the district court be discoverable under the laws of Chile, and (3) in any event, Chilean law empowers the Appellees to obtain the information requested. The Appellees and the Fodens stipulated to a stay of discovery pending this expedited appeal.

DISCUSSION

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. *See In re Letters Rogatory Issued by the Director of Inspection of India*, 385 F.2d 1017, 1018 (2d Cir. 1967) (denial of motion to vacate discovery order and to quash subpoena issued pursuant to 28 U.S.C. § 1782 constitutes final, appealable decision). We affirm, holding that section 1782 does not require the district court to make a finding of discoverability under the laws of the foreign jurisdiction. In addition, we hold that the district court's exercise of discretion was properly guided by the purposes of the statute.

I. History and Purposes of 28 U.S.C. § 1782

An understanding of the history and purposes of 28 U.S.C. § 1782 is an important first step in our inquiry. Section 1782, entitled "Assistance to foreign and international

tribunals and to litigants before such tribunals," provides in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.

28 U.S.C. § 1782(a).

Federal law has provided for some form of judicial assistance to foreign courts since 1855. *See* Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (allowing United States courts to compel testimony in response to letters rogatory from any court of a foreign country). However, early statutes granting judicial assistance were quite narrow in scope; for example, the statutes in effect from 1863 to 1948 required the foreign government receiving assistance to be a party or have an interest in the suit, and the suit had to be for the recovery of money or property. *See In re Letter Rogatory from the Justice Court, Montreal, Canada*, 523 F.2d 562, 564-65 (6th Cir. 1975) (reviewing the history of predecessor statutes to section 1782). The evolutionary process from the 1855 act to the current statute, most recently amended in 1964, has generally been one of increasingly broad applicability. For example, the judicial assistance statute progressively has applied to suits for "the recovery of money or property," to "any civil action," to "any judicial proceeding," and finally, to "a proceeding in a foreign or international tribunal." *See id.* at 565 ("These changes have made the statute increasingly

less restrictive and thus have evidenced the intent of Congress that the assistance be available to foreign governments in a greater number of instances.")

The 1964 amendments to section 1782 were drafted by the United States Commission on International Rules of Judicial Procedure, which was created by Congress in 1958. Pub. L. No. 85-906, 72 Stat. 1743, 1958 U.S. Code Cong. & Admin. News 2097. The amendments primarily (1) expanded the class of litigation in which section 1782 could be used by substituting the word "tribunal" for the word "court" and by adding international tribunals, (2) allowed not only foreign tribunals and officials to initiate the process, but also private litigants ("any interested person"), and (3) deleted the requirement that the foreign litigation actually be pending. Pub. L. No. 88-619, 78 Stat. 995, 997 (1964). The primary intent of the amendments was to "clarif[y] and liberalize[] existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States." S. Rep. No. 1580, 38th Cong., 2nd Sess. (1964), *reprinted in* 1964 U.S. Code Cong. & Admin. News 3782, 3788 (hereinafter "Senate Report"). The desired effect was that "the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." Senate Report at 3783. We have recently characterized the purpose of these changes as the "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir.) (*Malev*), *cert. denied sub nom. United Technologies Int'l* v. *Malev Hungarian Airlines*, 113 S. Ct. 179 (1992).

II. "Discoverability" Requirement

The Fodens' primary argument on appeal is that section 1782 contains an implicit requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction. The Fodens state that "[d]iscovery under § 1782 is intended to give foreign litigants the opportunity to obtain from U.S. witnesses whatever kinds of information they could obtain within their own country, *but not more*." Recognizing that there is no Second Circuit case law directly on point, the Fodens assert that four of our sister circuits have recognized a discoverability requirement in section 1782, and that the reasoning in those cases is persuasive. *See In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992); *In re Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 692-93 & n.7 (D.C. Cir. 1989) *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar v. Minister of Legal Affairs of Trinidad and Tobago,* 488 U.S. 1005 (1989); *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985). The Fodens argue that without a discoverability requirement, liberal United States discovery procedures would be unfairly imposed on those parties to foreign proceedings present in the United States or with United States ties, "upset[ting] the balance between litigants that each nation creates within its own judicial system" and effectively amending foreign law regarding the compulsory production of evidence as it applies to litigants with connections to the United States.

Chief Judge Cabranes rejected the Fodens' argument that section 1782 requires discoverability, finding "nothing in the text of section 1782 [requiring] that the law of the foreign tribunal provide for discovery of the information sought in the United States" and holding that the requirements of

section 1782 had been fully met by the Appellees. We ordinarily review for abuse of discretion a district court's *grant of discovery under section 1782. See Malev*, 964 F.2d at 99. However, the question of whether section 1782 imposes limitations on the district court's exercise of discretion is a question of law, which we review *de novo*. *See United States* v. *Edwards*, 960 F.2d 278, 281 (2d Cir. 1992) ("The interpretation of a federal statute is a question of law which we review *de novo*."); *see also Asta Medica*, 981 F.2d at 4 (reviewing *de novo* the question of whether a district court's discretion under section 1782 is limited by the requirement of discoverability). We agree with the district court that section 1782 does not impose the requirement that the material sought in the United States be discoverable under the laws of the foreign jurisdiction.

We start, as we must, with the language of the statute. *See United States* v. *Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'") (quoting *Griffin* v. *Oceanic Contractors*, 458 U.S. 564, 571 (1982)). The statutory language is unambiguous in its requirements: (1) the person from whom discovery is sought must reside or be found in the district of the district court to which the application is made, (2) the discovery must be "for use in a proceeding in a foreign or international tribunal," and (3) the application must be made "by a foreign or international tribunal" or by "any interested person." The language makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction. Indeed, the only language in section 1782 arguably relevant to the issue of whether the district court must adopt the discovery requirements of the foreign jurisdiction is permissive language, stating that the practice and procedure prescribed by the district court "*may* be in whole or part the practice

and procedure of the foreign country or the international tribunal." 28 U.S.C. § 1782(a) (emphasis added). As we recently made clear in *Malev*, we are not free to read extra-statutory barriers to discovery into section 1782. 964 F.2d at 100.

In *Malev*, appellant Malev had filed an application for discovery pursuant to section 1782 for use in a proceeding before a Hungarian court. The district court denied the discovery request and on appeal we reversed and remanded, holding that the district court had abused its discretion by relying on improper factors in its denial of discovery. The district court had based its decision primarily on the ground that Malev's section 1782 application was "'premature and unnecessary'" because Malev had "'never made a formal discovery request upon [the appellees] before the Hungarian Court.'" *Malev*, 964 F.2d at 100. The district court's other grounds for denial were that the Hungarian court had failed to make a request for assistance to the district court and that if the district court granted the requested discovery, it would be forced to bear the onerous burden of supervising reciprocal discovery. In holding each of the district court's grounds improper, we turned to the unambiguous language of section 1782. *Id.* at 100-01. We found "nothing in the text of 28 U.S.C. § 1782 which would support a quasi-exhaustion requirement of the sort imposed by the district court," and held that district courts may not impose such "extra-statutory barriers to obtaining discovery." *Id.* at 100. We further held that the district court's requirement that the foreign court make a request for assistance would impermissibly read the language "upon the application of any interested person" out of section 1782 and that section 1782 does not contain any requirement that the district court supervise reciprocal discovery. *Id.* at 101.

As we also pointed out in *Malev*, a literal reading of the unambiguous language of section 1782 comports with the purposes and legislative history of the statute. *Id.* at 100-01.

The Senate Report makes clear that the 1964 amendments were intended to leave the district courts with wide discretion in granting relief under section 1782:

> [Section 1782(a)] leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.

Senate Report at 3788. The Chairman of the Advisory Committee to the United States Commission on International Rules of Judicial Procedure expressed a similar viewpoint: "'[Section 1782] is a one-way street. It grants wide assistance to others, but *demands* nothing in return. It was deliberately drawn this way.'" *Malev*, 964 F.2d at 101 (quoting Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650, 651 (1965)). Given that the statutory language is silent and the legislative history indicates that "[i]n exercising its discretionary power, the court *may* take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country," Senate Report at 3788 (emphasis added), we find it difficult to believe that Congress actually intended section 1782 to have an implicit requirement that any evidence sought in the United States be discoverable under the laws of the foreign country. If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect. As we discuss in Part III below, district judges may well find that in

appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782. We hold, however, that no such threshold requirement exists in the statute.

The Fodens cite First and Eleventh Circuit decisions that explicitly read a discoverability requirement into section 1782 and argue that the reasoning in those decisions is persuasive.[1] *See Asta Medica*, 981 F.2d at 7; *Lo Ka Chun*, 858 F.2d at 1566; *Trinidad and Tobago*, 848 F.2d at 1156. We disagree. In *Asta Medica*, the First Circuit held that the district court's discretion under section 1782 was "limited by the restriction [of discoverability] that we find . . . to be implicitly required by section 1782, based upon its history, rationale, and the policy considerations we have discussed." 981 F.2d at 7. The policy considerations cited are: maintaining the balance between litigants that each nation creates within its own judicial system, preventing circumvention of foreign restrictions on discovery and avoiding offense to foreign tribunals. We agree that each of these is a legitimate policy consideration and that the legislative history indicates that these concerns were part of

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[1] The Fodens claim that decisions of the District of Columbia and Third Circuits also "recognize[] the discoverability requirement." *See Crown Prosecution Service*, 870 F.2d at 687, 692-93 & n.7; *John Deere*, 754 F.2d at 135-36. Neither case concerns whether section 1782 requires a showing of discoverability under the laws of the foreign jurisdiction. At issue in *Crown Prosecution Service* are proper evidence-taking procedures pursuant to section 1782. The case merely cites *Trinidad and Tobago* and *John Deere* in support of the proposition that "[t]he district court should have inquired more closely whether the projected evidence-taking procedure 'represents the British practice,' when use of the evidence in court is anticipated." *Crown Prosecution Service*, 870 F.2d at 692 (citations and footnote omitted). *John Deere*, as discussed in Part II, is a case about reciprocity and admissibility.

the motivation for the legislation. However, we disagree with the First Circuit's holding that, as a result of these concerns, Congress intended section 1782 to have an implied discoverability requirement. Instead, we believe Congress intended that these concerns be addressed by a district judge's exercise of discretion. *See* Senate Report at 3788 ("[section 1782] leaves the issuance of an appropriate order to the discretion of the court"); *see also* Amram, *Public Law No. 88-619 of October 3, 1964 — New Developments in International Judicial Assistance in the United States of America*, 32 D.C.B.J. 24, 31 (1965) (under section 1782, "[t]he grant of power is unrestricted, but entirely within the discretion of the Court").

The Eleventh Circuit also explicitly has held that section 1782 requires a finding of discoverability under the laws of the foreign jurisdiction. *Lo Ka Chun*, 858 F.2d at 1566; *Trinidad and Tobago*, 848 F.2d at 1156. In *Trinidad and Tobago*,[2] the court states that the discoverability requirement exists and in support cites *John Deere*, 754 F.2d at 136, and a district court case, *In re Court of the Comm'r of Patents for South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980). *Trinidad and Tobago*, 848 F.2d at 1156. In *John Deere*, however, the Third Circuit merely decided that section 1782 does not require (1) that the foreign courts have similar judicial assistance procedures, or (2) that the evidence sought be admissible under the rules of evidence of the foreign jurisdiction. 754 F.2d at 135-36. *John Deere* is not a case about whether section 1782 requires discoverability, and the court never explicitly states that such a requirement exists. The Fodens, however, point to the court's language in *John Deere* that on the facts before it the discoverability requirement has been met, and that "[a] grant of discovery

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[2] *Lo Ka Chun* cites *Trinidad and Tobago* as support for the discoverability requirement.

that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782." *Id.* at 135. The Fodens also note the court's "[c]oncern that foreign discovery provisions not be circumvented by procedures authorized in American courts." *Id.* at 136. Nonetheless, we are unconvinced that these general concerns of the *John Deere* Court require the reading of an absolute discoverability requirement into section 1782. *See id.* at 136 n.3 (quoting the language of the Senate Report concerning section 1782's grant of discretionary power to the district courts and stating that "[i]t is doubtful whether such language can be expanded to impose a requirement that district courts predict or construe the procedural or substantive law of the foreign jurisdiction").[3]

III. Abuse of Discretion

The Fodens argue that even if section 1782 does not contain a discoverability requirement and consequently the district court did not err as a matter of law, the court nonetheless "abused its discretion in this case by issuing an order that will defeat important purposes of the statute." The Fodens assert that, according to their expert on Chilean law, in Chile

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[3] In the district court case cited by the Third Circuit, *Court of the Comm'r of Patents for South Africa*, the district court did not hold that section 1782 requires that a finding of discoverability be made prior to granting discovery under the statute. Instead, the court properly considered that "Congress expects the district courts to grant requests that will spur a reciprocity of cooperation," and held that under the facts before it, this purpose of the statute would be defeated by a grant of discovery. 88 F.R.D. at 77; *see also* Part III. The court found discoverability to be a useful guide to its exercise of discretion in the case before it because the Commissioner of Patents was not represented in the action and the court had grounds to believe that the applicant was attempting to circumvent South African discovery restrictions. 88 F.R.D. at 77.

"there is no pretrial discovery as we know it in the United States" and no compulsory process would be available in Chile to aid in the inventory of Ciro's assets. The Fodens then set out a parade of horribles that would result if we were to uphold the district court's grant of discovery, such as (1) granting to foreign litigants power to obtain information that they would not have in their home jurisdiction, thereby "ignoring principles of comity and risking offense to a friendly foreign sovereign," and (2) "opening the federal courts to a deluge of foreign litigants seeking to avoid the restrictions on pretrial discovery procedures in their own jurisdictions."

In his oral opinion, Chief Judge Cabranes first held that all of the requirements of section 1782 had been met and that discoverability was not a requirement of the statute. He then continued, in pertinent part:

> In any event, the court finds that the law of Chile empowers the provisional guardians to obtain the information about Ciro Gianoli's assets. The provisional guardians have a duty to compile an inventory of Ciro Gianoli's assets by order of the Chilean court . . . [and] under Article 378 of the Civil Code of Chile . . . . It is difficult, if not impossible, to conclude that a court that orders an inventory of this sort does not have the power to inquire into assets abroad so that the required inventory can be complete.
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> In fact, both parties agree that the Chilean court could issue a letter rogatory to inquire about assets that should be included in the required inventory . . . and that the enforcement of a letter rogatory would be governed by the law of the receiving nation, here the United States. . . .
>
> Finally, it is clear from the record that obtaining the information from the Fodens would not be an affront to the Chilean court or the Chilean sovereignty. It is clear

> that allowing the depositions to proceed would actually assist the Chilean court in its ongoing proceedings. In fact, the law of Chile does not prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken.

(citations omitted).

In *Malev*, we held that the "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts must inform our analysis of whether the district court abused its discretion." 964 F.2d at 100. Because the district court's exercise of discretion properly was guided by the purposes of section 1782, we hold that the court did not abuse its discretion. Although the district court did not make a finding as to the parties' ability to obtain pretrial discovery under Chilean law, it clearly made an *inquiry* into whether its grant of discovery under section 1782 would circumvent Chilean restrictions on discovery and whether its grant of discovery would be an affront to the Chilean court or Chilean sovereignty. In this way the district court assured that section 1782's purposes, especially that of encouraging international cooperation, were being furthered by the court's actions and not hindered.

Given that the guardians had been ordered by the Chilean court to compile an inventory of Ciro's assets, Chief Judge Cabranes reasonably found that it was highly unlikely that the Chilean court would not have the power to "inquire into assets abroad so that the required inventory can be complete." Because, as Chief Judge Cabranes also found, litigants in Chile are not prohibited from, "gathering evidence through methods that are lawful in the place where those methods are undertaken," a grant of discovery under section 1782 would be unlikely to circumvent Chilean discovery restrictions. Finally, Chief Judge Cabranes

reasonably found that because the district court's grant of discovery clearly would aid the Chilean court in obtaining a complete inventory, discovery under section 1782 would "not be an affront to the Chilean court or the Chilean sovereignty." Thus, despite no specific finding as to the availability under Chilean law of pre-trial discovery of the information sought, Chief Judge Cabranes satisfied himself that granting the section 1782 application on the facts before him would not be counter to the statute's "twin purposes." Because the district court's exercise of discretion was thus properly guided, we find no abuse of discretion. The parade of horribles predicted by the Fodens in the absence of extra-statutory restrictions on section 1782 is unlikely to occur given that district courts, in exercising their discretion, are not free to ignore the purposes underlying the statute.

IV. "Adjudicative Proceeding" Requirement

Finally, the Fodens argue that section 1782's requirement that discovery be granted only "for use in a proceeding in a foreign or international tribunal" has not been met in this case. The Fodens contend that "[t]he compiling of the inventory is not an adjudicative proceeding, but rather a non-contentious, unilateral task that the provisional guardians must complete before assuming guardianship." This argument is without merit. Ciro's incompetency proceeding before the Third Civil Court in Santiago, Chile is a "proceeding in a foreign . . . tribunal." The evidence sought in the district court pursuant to the order of the Chilean court is clearly "for use in" the proceeding. Whether or not the compilation of the inventory is contentious or adjudicative is irrelevant, because it is part of the incompetency proceeding.

CONCLUSION

We affirm the district court's grant of discovery against the Fodens pursuant to 28 U.S.C. § 1782. We hold that section

1782 does not contain a requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction. Finally, we hold that the district court, by looking to the congressional purposes behind section 1782, properly informed its exercise of discretion.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE:

THE APPLICATION OF SILVIA GIANILI ALDUNATE and JOSE MIGUEL BARRIGA GIANOLI — 3:92-MC-186(JAC)

MARCH 8, 1993
NEW HAVEN, CONNECTICUT

B E F O R E:
HON. JOSE A. CABRANES, CHIEF U.S.D.J.

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Paul Collard
Official Court Reporter

THE COURT: I am now prepared to rule on the pending motion of January 8, 1993 to vacate the Court's order of November 16, 1992 and to quash the subpoenas issued pursuant thereto, based on a review of the record before me, including the arguments of counsel today.

Section 1782(a) of Title 28 of the United States Code provides, in relevant part, that the district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to the letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person. . . . (emphasis supplied).

It is clear to this court that all the requirements of section 1782 are met in this case. There is no dispute that the Fodens reside in the District of Connecticut; that Silvia Gianoli Aldunate and Jose Miguel Barriga Gianoli, the provisional guardians of Ciro Gianoli's property, are "interested persons" within the meaning of the statute; and that the provisional guardians have been ordered by a Chilean court to conduct an inventory of Mr. Gianoli's assets.

There is abundant evidence in the record that the Fodens are or may be in possession of relevant information on the assets of Ciro Gianoli and should be subject to discovery. In fact, counsel to the Fodens conceded on the record at this morning's oral argument that Ciro Gianoli had involved Maria Luisa Foden in his financial affairs. This admission, coupled with the allegations of fact of the provisional guardians, support the contention that the Fodens may have information on the whereabouts of Ciro Gianoli's assets.

Although the Fodens contend that the subpoenas should be quashed because "the information sought would not be available in Chile," see Foden Memorandum, filed January 8, 1993 at 10, there is no foundation for this

contention in section 1782. There is nothing in the text of Section 1782 that requires that the law of the foreign tribunal provide for discovery of the information sought in the United States. Although the Courts of Appeals of the First and Eleventh Circuits have held that a district court, before issuing an order of assistance, must determine whether the evidence sought in the United States would be discoverable in the foreign tribunal, our Court of Appeals has not adopted such a standard.

Our Court of Appeals recently dealt with related questions in Application of Malev Hungarian Airlines, 964 F.2d 97, 100 (Second Circuit), cert. denied, 113 S. Ct. 179 (1992). In Malev, the district court denied Malev's application under section 1782 on the grounds that Malev should have first requested discovery from a Hungarian court. Our Court of Appeals reversed the district court stating that "we find nothing in the text of 28 U.S.C. section 1782 which would support a quasi-exhaustion requirement of the sort imposed by the district court." Id. Malev requires a plain reading of the statute. The Fodens in the instant case are asking this court to impose a requirement that is not set forth in the text of section 1782. This court is mindful of the teaching of our Court of Appeals that a district court may not "impose extra-statutory barriers to obtaining discovery" under section 1782. Malev, 964 F.2d at 100.

In any event, the court finds that the law of Chile empowers the provisional guardians to obtain the information about Ciro Gianoli's assets. The provisional guardians have a duty to compile an inventory of Ciro Gianoli's assets by order of the Chilean court. See Affidavit of Jose Maria Eyzaguirre Garcia de la Huerta, filed February 5, 1993, at Paragraph 4. The guardians have the duty to compile the inventory of Ciro Gianoli's assets under Article 378 of the Civil Code of Chile. Id. It is difficult, if not impossible, to conclude that a court that orders an inventory of this sort

does not have the power to inquire into assets abroad so that the required inventory can be complete.

In fact, both parties agree that the Chilean court could issue a letter rogatory to inquire about assets that should be included in the required inventory. See Article 862, Civil Procedure Code of Chile in Eyzaguirre Affidavit at Paragraph 7, and that the enforcement of a letter rogatory would be governed by the law of the receiving nation, here the United States, not the sending nation. See 22 C.F.R. section 92.67(a).

Finally, it is clear from the record that obtaining the information from the Fodens would not be an affront to the Chilean court or the Chilean sovereignty. It is clear that allowing the depositions to proceed would actually assist the Chilean court in its ongoing proceedings. In fact, the law of Chile does not prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken. See Eyzaguirre Affidavit at Paragraph 17. Since any discovery in the instant action would proceed pursuant to the Federal Rules of Civil Procedure, there is no suggestion that the methods used in the instant case would be unlawful or would otherwise offend the sense of justice of Chile's courts or our own courts.

Based on the full record before me, including this morning's oral argument, the Motion to Vacate Order and Quash Subpoenas, filed January 8, 1993 of Maria Luisa Foden and Edward Foden is hereby Denied. It is so ordered.

Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-513

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

IN RE: APPLICATION OF SILVIA GIANOLI ALDUNATE AND JOSE MIGUEL BARRIGA GIANOLI

MARIA LUISA DE CASTRO FODEN AND EDWARD FODEN,
Petitioners
v.
SILVIA GIANOLI ALDUNATE AND JOSE MIGUEL BARRIGA GIANOLI

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in ordering petitioners to testify and produce documents for use in a proceeding in a court in Chile.

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IN THE

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IN RE: APPLICATION OF SILVIA GIANOLI ALDUNATE AND JOSE MIGUEL BARRIGA GIANOLI

MARIA LUISA DE CASTRO FODEN AND EDWARD FODEN,

Petitioners

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is not yet reported. The decision of the district court (Pet. App. A20-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1993. The petition for a writ of certiorari was filed on September 30, 1993. The juris-

diction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case arises out of a Chilean court's order to compile an inventory of the assets of Ciro Gianoli Martinez, a citizen and resident of Chile. The Chilean court provisionally declared Mr. Gianoli mentally incompetent and appointed respondents, his daughter and grandson, as his provisional guardians. Respondents (the "Guardians") filed an *ex parte* application in the United States district court for judicial assistance under 28 U.S.C. § 1782 in order to obtain evidence from petitioners for use in compiling the inventory ordered by the Chilean court. The Guardians' application alleged that approximately $8 million of Mr. Gianoli's cash and securities had vanished after bank statements and stock certificates relating to those assets were sent to petitioners.

The United States district court granted the Guardians' application and rejected petitioners' subsequent motion to vacate the court's order and quash subpoenas served on them by the Guardians. The court of appeals affirmed.

1. On December 21, 1935, Ciro Gianoli Martinez married Elena Aldunate Lynch. The couple had four children, two of whom are still living. Respondent and Provisional Guardian Silvia Gianoli Aldunate is one of Mr. Gianoli's living daughters. Respondent and Provisional Guardian José Miguel Barriga Gianoli is the son of one of the deceased daughters.

Mr. Gianoli and his wife began to live apart many years ago, but they remained married under Chilean law. For approximately the last 12 years, Mr. Gianoli has lived with a woman named Ana Eguiguren Rozas ("Ana Eguiguren"). Petitioner Maria Luisa Foden

is the daughter of Ana Eguiguren. Petitioner Edward Foden is the husband of Maria Luisa Foden and Ana Eguiguren's son in law. J.A. 243 ("J.A." signifies the joint appendix in the court of appeals.)

Mr. Gianoli personally controlled his financial affairs until about 1989. He also had consistent and regular contact with his daughters, other family members and friends until about 1989. Beginning in that year, however, Ana Eguiguren prevented Mr. Gianoli's daughters, other family members, and most of his close friends from seeing or speaking to him. J.A. 13-14. Although Mr. Gianoli repeatedly told one of his nurse's aides that he wanted to see his daughters, Ana Eguiguren refused Mr. Gianoli access to a telephone, locked away his telephone book, told him that his family had abandoned him, and forced him to sign documents—holding and guiding his hand and making him practice his signature. J.A. 31-35.

2. On April 9, 1992, all of Mr. Gianoli's living descendants commenced a proceeding before the Third Civil Judicial District Court of First Instance in Chile and requested that the court declare Mr. Gianoli mentally incompetent and appoint a guardian for him. On April 27, 1992, the court personally visited Mr. Gianoli at his home. It found him "in a state of semi-sleep" and unable to respond when asked about his own name, "although he tried to." J.A. 67. A court-appointed physician determined that Mr. Gianoli is "senile," "permanently and totally prostrate in a surgical bed," and "total[ly] dependen[t] on third parties for his sustenance and general care, as well as for his survival." J.A. 72-73.

Ana Eguiguren opposed the relief requested by Mr. Gianoli's descendants. She maintained that Mr.

Gianoli is competent. In support of her opposition, Ana Eguiguren submitted an affidavit ostensibly signed by Mr. Gianoli and dated December 31, 1990. The affidavit purports to give Ana Eguiguren control over Mr. Gianoli's health and care if he becomes unable to "manifest his will," states that his relatives are "not to visit him," and purports to authorize Ana Eguiguren to determine who may visit him. J.A. 78-106.

On May 22, 1992, over Ana Eguiguren's opposition, the Chilean court provisionally determined Mr. Gianoli to be mentally incompetent. On May 25, 1992, the court appointed the respondents provisional guardians of Mr. Gianoli. The court further ordered that, "[i]n due time, a certified inventory of the property of the ward must be conducted." J.A. 127.

On Ana Eguiguren's appeal, the Chilean Supreme Court affirmed. J.A. 136.

3. On October 27, 1992, consistent with the order of the Chilean court requiring the inventory of Mr. Gianoli's assets, the Guardians applied *ex parte* to the United States District Court for the District of Connecticut for an order of judicial assistance under 28 U.S.C. § 1782. Section 1782 provides, in pertinent part:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . .

The Guardians asked the district court to order petitioners to "provide any documents they have and . . . [to] give testimony concerning the assets of Casabianca," a Panamanian corporation founded and beneficially owned by Mr. Gianoli, "and the current whereabouts of those assets." The Guardians sought additional evidence from petitioners about the location of other assets belonging to Mr. Gianoli. J.A. 27-28.

In support of their application, the Guardians submitted the affidavit of George E. Deren, an investigator retained by the Guardian's counsel. Mr. Deren's investigation revealed that:

> The [petitioners] effectively took control of Casabianca. Millions of dollars in cash passed out of Casabianca after they became involved in Casabianca's affairs. Millions of dollars in securities passed out of Casabianca and into [petitioner] Edward Foden's hands. These assets have now disappeared. It is especially appropriate that the [petitioners] account for these assets because they were fiduciaries of Casabianca, or at least they claimed to be fiduciaries, [petitioner] Edward Foden having been named a director at or about the time he received the stock certificates from Fahnestock [& Co., a national brokerage firm] and [petitioner] Maria Luisa Foden claiming to be the attorney for Casabianca when she received monies from Fahnestock.

J.A. 27. Further investigation showed that Casabianca owned gold on depcsit at the Bank of Nova Scotia in New York, that Casabianca's gold was transferred to Switzerland, and that petitioner Maria Luisa Foden was personally involved in those transfers. J.A. 294.

4. On March 8, 1993, the United States District Court for the District of Connecticut (Cabranes, C.J.) denied petitioner's motion to vacate the court's order granting judicial assistance and denied petitioners' motion to quash subpoenas served on them by the Guardians. Pet. App. A20-A24.

After quoting 28 U.S.C. § 1782, the district court observed that "[i]t is clear . . . that all the requirements of section 1782 are met in this case." Pet. App. A22. The court noted that "[t]here is no dispute" that petitioners reside in the District of Connecticut; that the Guardians are "interested persons" within the meaning of 28 U.S.C. § 1782; and that the Guardians have been ordered by the Chilean court to conduct an inventory of Mr. Gianoli's assets. Pet. App. A22. The court further noted that "[t]here is abundant evidence in the record that the [petitioners] are or may be in possession of relevant information on the assets of Ciro Gianoli and should be subject to discovery." *Id.*

The district court rejected petitioners' contention that the subpoenas should be quashed because the information sought by the Guardians would not be available in Chile. Pet. App. A22-A23. To begin with, the court pointed out that "nothing in the text of section 1782 . . . requires that the law of the foreign tribunal provide for discovery of the information sought in the United States." *Id.* at A23. To the contrary, petitioners "are asking this court to impose a requirement that is not set forth in the text of section 1782." *Id.*

"In any event," the court found that "the law of Chile empowers the provisional guardians to obtain the information about Ciro Gianoli's assets." Pet.

App. A23. The district court explained that "[i]t is difficult, if not impossible, to conclude that a court that orders an inventory of this sort does not have the power to inquire into assets abroad so that the required inventory can be complete." *Id.* at A23-A24.

Finally, the district court found it "clear from the record that obtaining the information from the [petitioners] would not be an affront to the Chilean court or the Chilean sovereignty." Pet. App. A24. To the contrary:

> It is clear that allowing the depositions to proceed would actually assist the Chilean court in its ongoing proceedings. In fact, the law of Chile does not prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken.

Id.

5. On appeal, the United States Court of Appeals for the Second Circuit affirmed. It held first, that "section 1782 does not require the district court to make a finding of discoverability under the laws of the foreign jurisdiction"; and second, that the district court did not abuse its discretion in granting the judicial assistance requested by the Guardians. Pet. App. A6.

The court of appeals began with "the language of the statute." Pet. App. A10. It noted that "[t]he statutory language is unambiguous in its requirements" and "makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction." *Id.* Indeed, the court of appeals observed that "the only language in section 1782 arguably relevant to the issue of whether the district court must adopt the discovery requirements

of the foreign jurisdiction is permissive language, stating that the practice and procedure prescribed by the district court '*may* be in whole or part the practice and procedure of the foreign country or the international tribunal.'" Pet. App. A10-A11 (quoting 28 U.S.C. § 1782(a); emphasis court's). The court of appeals explained that it was "not free to read extra-statutory barriers to discovery into section 1782." Pet. App. A11. Accordingly, it rejected petitioners' contention that § 1782 contains an "implicit" requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction. Pet. App. A9.

The court of appeals reasoned that § 1782 does not require a "threshold showing" that the discovery sought in the district court would be available under the laws of the foreign jurisdiction, Pet. App. A3, but gives district courts authority to consider foreign practices in exercising their "wide discretion" under the statute. Pet. App. A12. In support of its reasoning, the court of appeals quoted the Senate Report on the bill that became 28 U.S.C. § 1782:

> [Section 1782(a)] leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.

Pet. App. A12 (quoting S. Rep. No. 1580, 88th Cong., 2d Sess. 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788). In view of the broad grant of discretionary power and the legislative history discussing the factors relevant to the exercise of that power, the court of appeals concluded that "district judges may well find that in appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782." Pet. App. A12-A13. The court of appeals held, however, that "no such threshold requirement exists in the statute." *Id.* at A13.

The court below recognized that the court of appeals for the First and Eleventh Circuits had stated that § 1782 contains an "implied discoverability requirement" in order to maintain a balance between litigants in foreign proceedings, to prevent circumvention of foreign restrictions on discovery, and to avoid giving offense to foreign tribunals. Pet. App. A13-A14 (discussing *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); and *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989)). The court below agreed that those policy considerations were proper factors for district courts to consider in the exercise of their discretion, but it disagreed that those policies required the judiciary to create a threshold foreign discoverability requirement. Pet. App. A13-A14.

After concluding that § 1782 authorized the judicial assistance sought by the Guardians, the court of

appeals next determined that the district court did not abuse its discretion in granting the Guardians' application. Pet. App. A15-A18. The court of appeals sustained the district court's findings that the Chilean court had the power to discover assets abroad to complete the required inventory; that Chilean law allowed discovery through methods lawful in the jurisdiction where discovery takes place; and that the discovery here would by no means be an affront to the Chilean court because it would allow that Guardians to complete the inventory ordered by the Chilean court. *Id.* at A17-A18. "In this way the district court assured that section 1782's purposes, especially that of encouraging international cooperation, were being furthered by the court's actions and not hindered." Pet. App. A17. The court of appeals rejected petitioners' "parade of horribles" argument because the imagined parade would not materialize: "district courts, in exercising their discretion, are not free to ignore the purposes underlying the statute." *Id.* at A18.[1]

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[1] The court of appeals also rejected petitioners' argument that § 1782 limited discovery to "adjudicative proceeding[s]" as being "without merit." Pet. App. A18. Quoting the language of § 1782, the court held that "[t]he evidence sought in the district court pursuant to the order of the Chilean court is clearly 'for use in' the proceeding." Pet. App. A18. Petitioners do not challenge that ruling in this Court.

ARGUMENT

The judgment below is correct and does not warrant further review. The court of appeals correctly determined that 28 U.S.C. § 1782 does not require the Guardians to make a threshold showing that the materials they seek would be discoverable in Chile. The court below also correctly determined that, on the facts of this case, the discovery granted was well within the discretion of the district court.

For more than 20 years, courts and commentators agreed that § 1782 does not condition a grant of judicial assistance on discoverability in the foreign jurisdiction, although it permits the district court to consider that fact in exercising its discretion whether or not to grant discovery and on what terms. In the last few years, however, courts of appeals in the First and Eleventh Circuits have stated that applicants for judicial assistance under § 1782 must make a threshold showing that the material they seek would be discoverable in the foreign jurisdiction. Although the language of those opinions is in tension with the decision below, it does not suggest the need to review the decision below, for three reasons.

First, the foreign discoverability issue is of little practical significance. The issue has arisen in fewer than half a dozen cases in almost 30 years since § 1782 assumed its current form.

Second, the tension between the decision of the Second Circuit below and the opinions of the First and Eleventh Circuits is not *whether* to examine foreign discoverability, but *when*. The Second Circuit held that foreign discoverability should be considered by the district court in making its decision whether or not to grant discovery and on what

terms. The First and Eleventh Circuits stated that foreign discoverability must be determined at the threshold. Application of the Second Circuit's standard would not have dictated a different result in the cases decided by the First and Eleventh Circuits.

Third, the First and Eleventh Circuits may reconsider the statements in their opinions in a proper case. Their opinions focused on whether or not to consider foreign discoverability, not when that factor should enter into the district court's discretionary decision. In light of the Second Circuit's decision below, the First and Eleventh Circuit may (and should) conclude that foreign discoverability is not a threshold precondition to a grant of judicial assistance under 28 U.S.C. § 1782 but is one factor for consideration by the district court. Upon reconsideration, the First and Eleventh Circuits may clarify the proper stage at which the district court is to consider foreign discoverability, thereby obviating the need for this Court's review. In the meantime, it would be premature for this Court to grant review of the decision below.

Finally, even if this Court were inclined to decide whether § 1782 requires a threshold showing of foreign discoverability, this case is not a suitable vehicle for resolving that question. The Guardians demonstrated in the district court and the court of appeals that the discovery sought would be available to them under the laws of Chile. The judgment in this case, therefore, does not turn on whether § 1782 implicitly requires that material be discoverable under the laws of the foreign jurisdiction.

1. It has been undisputed for more than 20 years that 28 U.S.C. § 1782 does not require the applicant

for judicial assistance to make a threshold showing that the material sought would be discoverable in the foreign jurisdiction if the parties and evidence were located there. "In a statutory construction case, the beginning point must be the language of the statute." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The text of § 1782 gives a broad grant of discretion to the district court, which "may" order a person "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." In exercising its discretion, the district court may grant or deny the application and "prescribe the practice and procedure, which may be in whole or in part the *practice* and procedure *of the foreign country or the international tribunal.*" 28 U.S.C. § 1782(a) (emphasis added). As the court below correctly held, the "unambiguous" (Pet. App. A10) text makes plain that foreign practice—including foreign discoverability—is not as threshold barrier to judicial assistance, but simply a factor to be considered by the district court in the exercise of its discretion to grant or deny the application and to impose the terms and conditions on which discovery may proceed.

The legislative history confirms that foreign discoverability is a factor for the district court to consider in the exercise of its discretion and not a precondition to an award of judicial assistance. The Senate Report (quoted *supra* at 8-9) states that the district court, in exercising its discretion whether or not to grant judicial assistance and on what terms, may consider the "character of the proceedings in [the foreign] country." S. Rep. No. 1580, 88th Cong., 2d Sess. 7, *reprinted in* 1964 U.S.C.C.A.N. at

3788. The "character" of the foreign proceedings includes the discovery practices in those proceedings. Since the Senate Report includes that factor as one to be considered by the district court in exercising its discretion, foreign discoverability is plainly not a threshold requirement for judicial assistance.

Informed commentators have likewise long understood that § 1782 does not impose a threshold requirement of foreign discoverability, but rather leaves that consideration to the discretion of the district court. In 1965, Professor Hans Smit of the Columbia Law School explained that § 1782 would typically provide greater discovery than that available from foreign tribunals:

> The liberal assistance provided by American courts may well give the foreign court or litigant a *more effective device* of compelling the production of tangible evidence in the United States *than is available in the foreign country.*

Hans Smit, *Introduction* to INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE 8 (H. Smit ed. 1965) (emphasis added). To illustrate the point that § 1782 provides discovery in excess of that allowed in the foreign jurisdiction, Professor Smit used the example of party statements:

> Under new Section 1782, the district court may order the taking of both testimony and statements. Under the laws of many foreign countries, parties may not be heard as witnesses and party statements are not considered testimony. By specifically referring to statements, *Section 1782 makes clear that the district court may order that parties and other persons, whose statements do not qualify as testimony under foreign practice, may be heard.*

Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 (1965) (emphasis added). According to Professor Smit, § 1782 often provides greater discovery than would be permitted in the foreign proceeding. The converse of that proposition, of course, is that foreign discovery practices do not place a ceiling on the judicial assistance available under 28 U.S.C. § 1782.

Professor Smit's thoughtful views of § 1782 merit close consideration. As then-Judge Ginsburg explained in *In re Letter of Request from Crown Prosecution Service*, 870 F.2d 686, 689 (D.C. Cir. 1989), Professor Smit "was the dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782." [2]

Petitioners' contention that § 1782 "appears directed not to discovery, but to the production of admissible evidence" (Pet. 10) rests on a false dichotomy between discovery of evidence and its use in a proceeding. The ultimate purpose of discovery is to produce admissible evidence, or as Federal Rule of Civil Procedure 26(b)(1) puts it, to be "reasonably calculated to lead to the discovery of admissible evidence." Petitioner is therefore wrong to suggest

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[2] Professor Smit functioned as the Director of the Project on International Procedure at the Columbia Law School beginning in June 1960. He also acted as the Reporter to the United States Commission on International Rules of Judicial Procedure, a body created by Congress first to study United States rules relating to litigation with international aspects, then to propose appropriate legislative reforms. The Commission's proposals [were] all . . . accepted by Congress without change. . . .

In re Letter of Request from Crown Prosecution Service, 870 F.2d at 690 n.2 (Ginsburg, J.).

that the discovery right in § 1782 is "implied." Pet. 11. That right is granted expressly in the statute's grant of authority to the district court to order testimony or document production "for *use* in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a) (emphasis added); see *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136-37 (3d Cir. 1985) (reversing a district court's refusal to grant discovery under § 1782 which was based, in part, on the district court's erroneous view that the material sought must itself be admissible evidence); *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976) (evidence may be used in preliminary stages of a foreign proceeding even though not admissible at trial).

2. For more than 20 years, no court considering an application for judicial assistance under § 1782 required a threshold showing of foreign discoverability. Instead, foreign discoverability was considered by the district court in the exercise of its discretion. For example, in *In re Court of Commissioner of Patents for Republic of South Africa*, 88 F.R.D. 75 (E.D. Pa. 1980), the district court denied a request for judicial assistance under 28 U.S.C. § 1782 filed by a party to patent litigation in South Africa. Although the district court recognized that it had the power to grant discovery, it declined to do so in the exercise of its discretion:

> The statute empowers this Court to order discovery in this case, and that [the party seeking discovery under § 1782] as an "interested person" may properly apply for such an order. It is, however, equally clear from the legislative history of this statute that this is an inappro-

> priate case for such an exercise of apparently broad discretion.

88 F.R.D. at 77. The district court declined to grant judicial assistance, in part because the party seeking discovery could not represent that the documents and testimony it sought would be "discoverable under South African law." *Id.*

The Third Circuit cited the *South African Patents* decision with approval in *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (1985). In *John Deere*, the Third Circuit reversed the district court's refusal to grant judicial assistance under 28 U.S.C. § 1782. Although the court of appeals explained that its decision "does not countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals," it is clear in context that its statement requires not a threshold showing of foreign discoverability, but rather the appropriate exercise of the district court's discretion on the facts of a given case. *Id.* at 136. That much is clear from the Third Circuit's reliance on the *South African Patents* decision, which recognized the district court's discretion to grant judicial assistance regardless of foreign discovery practices, and the court of appeals' elaborate footnote describing the discretion vested in the district court. *Id.* at 136 n.3.[3]

3. It is true that three recent opinions of the First and Eleventh Circuits state that the district court must determine at the threshold whether material sought under 28 U.S.C. § 1782 would be discoverable in the foreign jurisdiction. Although those state-

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[3] Thus, contrary to petitioners' contention (Pet. 8-9), and as the court below pointed out (Pet. App. A14-A15), the Third Circuit did not hold that § 1782 requires a threshold determination of foreign discoverability.

ments are in tension with the decision of the court below, this Court reviews judgments, not statements in opinions. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956); see *California* v. *Rooney*, 483 U.S. 307, 311 (1987). The judgment of the Second Circuit below is not inconsistent with the judgments of the First and Eleventh Circuits. The First and Eleventh Circuits created a threshold discoverability requirement to protect U.S. parties to foreign litigation and to prevent circumvention of foreign discovery practices. Exactly the same judgments reached in First and Eleventh Circuits would be reached in the Second Circuit by the proper exercise of the district court's discretion.

The opinions of the First and Eleventh Circuits can also be reconciled with that of the Second Circuit below. The opinions of the First and Eleventh Circuits focused virtually exclusively on *whether* to consider foreign discoverability, rather than *when* the district court should consider that factor—at the threshold or in the exercise of the court's discretion. In contrast, the Second Circuit agreed with the need to consider those "policy considerations," but concluded that "Congress intended that these concerns be addressed by a district judge's exercise of discretion." Pet. App. A13-A14. Since the First and Eleventh Circuits have not confronted the precise question decided by the Second Circuit below—namely, *when* should the district court consider foreign discoverability in ruling on an application for judicial assistance under 28 U.S.C. § 1782—it is premature to conclude that the circuits are divided. A brief description of the First and Eleventh Circuit opinions lays bare the superficial nature of the purported conflict.

The earliest decision supposedly in conflict with the decision below is *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989). In that case, a panel of the Eleventh Circuit affirmed a district court's order granting judicial assistance and held that § 1782 did not require the foreign proceeding to be pending at the time of the application. *Id.* at 1152, 1154-56. Although the panel affirmed the grant of judicial assistance, it noted, in its penultimate paragraph, that "the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance." *Id.* at 1156. The panel's dictum was entirely unnecessary to, and had no effect on, the judgment in that case. In addition, the panel did not consider whether foreign discoverability should be a threshold consideration or a factor for the district court to consider in the exercise of its discretion.

A few months later, another panel of the Eleventh Circuit quoted the *Trinidad and Tobago* dictum and remanded for a determination whether the evidence sought in the application for judicial assistance would be discoverable in the foreign jurisdiction. *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (1988). The panel rested the foreign discoverability requirement entirely on the *Trinidad and Tobago* dictum. Like that earlier dictum, the panel's two-page opinion did not consider whether foreign discoverability should be considered at the threshold or as an element in the exercise of the district court's discretion. *Id.*

Lastly, in *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1992), the First Circuit reversed a district court's grant of judicial assistance to a foreign

corporation seeking testimony and documents for use in foreign patent proceedings against an American corporation. The panel required "a threshold showing that the information would be discoverable in the foreign jurisdiction if located there," in order to prevent the foreign corporation from gaining an "unfair advantage" over the American corporation and from "circumvent[ing] foreign law and procedures." *Id.* at 6. The panel did not focus on whether foreign discoverability should be considered at the threshold or in the exercise of the district court's discretion. Indeed, the panel's statement that absence of a threshold requirement would open "the floodgates . . . for unlimited discovery" (*id.* at 5) suggests that it was not aware that insufficient attention to foreign discoverability by the district court could constitute an abuse of discretion.

It is plain that the opinions of the First and Eleventh Circuits do not represent a considered judgment that foreign discoverability should be taken account of at the threshold rather than in the exercise of the district court's discretion. Those decisions thus do not conflict with the decision of the Second Circuit below that foreign discoverability should be considered at the latter stage. To be sure, the language of the First and Eleventh Circuits is in tension with that of the Second Circuit, but sound judicial administration suggests that the First and Eleventh Circuits be given the opportunity to reconsider their statements in light of the decision of the Second Circuit and to clarify their view of the proper time when foreign discoverability enters into the decision on an application for judicial assistance under 28 U.S.C. § 1782. If the First and Eleventh circuits join the Second Circuit, no further review will be

required by this Court. If those circuits reject the holding of the Second Circuit, those later decisions will provide an appropriate occasion for this Court's review. The fact that the foreign discoverability requirement has arisen in fewer than half a dozen cases in almost 30 years demonstrates that there is no immediate need for this Court's review.

4. In support of their petition for a writ of certiorari, petitioners predict, as they did in the court below, a "parade of horribles." Pet. App. A18. Specifically, petitioners contend that absence of a threshold foreign discoverability requirement will (1) discourage foreign countries from cooperating in international discovery; (2) put U.S. parties to foreign litigation at a disadvantage; and (3) place an undue burden on the district courts. Pet. 12-17. As has been pointed out elsewhere, however, the strength of the parade-of-horribles form of argument "is in direct proportion to (1) the certitude that the provision in question was meant to exclude the very evil represented by the imagined parade, and (2) the probability that the parade will in fact materialize." *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2697 n.11 (1991) (Scalia, J.). Here, no parade will materialize because the permit to march lies within the sound discretion of the district court.

Petitioners' argument presupposes that, without a threshold requirement of foreign discoverability, district courts will rubber stamp applications for judicial assistance—ignoring the sensibilities of foreign sovereigns, the predicament of U.S. parties to foreign litigation, and the demands on their own resources. Petitioners' hypothesis is inherently unbelievable. Moreover, it is contradicted by more than 20 years of experience. From 1964 (the year 28 U.S.C. § 1782

became law in its current form) until 1988 (when the Eleventh Circuit first broached a foreign discoverability requirement) the federal district courts managed to entertain applications for judicial assistance under § 1782 without requiring applicants to make a threshold showing of foreign discoverability and without the ills petitioners predict. The reason for their success is obvious: their discretion to grant or deny requests for assistance and to impose terms and conditions on the discovery they allow. When particular applications for assistance have posed the threats imagined by petitioners, as in the *South African Patents* litigation, district courts have simply refused to grant the requested relief, or have done so on terms consonant with the purposes of the statute. Although petitioners assert that "[t]his retreat to the discretion of individual judges is simply unworkable" and without a "standard" (Pet. 14), petitioners can point to no empirical problems in the exercise of the district court's discretion or in the court of appeals' review of their decisions under the familiar "abuse-of-discretion" standard. Indeed, if the abuse-of-discretion standard is "unworkable," as petitioners say (Pet. 14), this Court has far greater problems than the administration of judicial assistance under 28 U.S.C. § 1782.[4]

Far from avoiding problems in relations with foreign sovereigns and in the administration of the U.S. judicial system, petitioners' categorical refusal to grant assistance absent proof of foreign discoverabil-

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[4] Nor is there any reason to fear that federal district courts will become preoccupied supervising discovery under § 1782. The statute provides that the district court "may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court."

ity would create those very problems, especially in requests for assistance from "foreign or international tribunal[s]." 28 U.S.C. § 1728. The foreign discoverability requirement advocated by petitioners would require the federal district courts to turn a blind eye to requests in aid of foreign criminal prosecutions or administrative proceedings any time the evidence would not be discoverable under the practice of that country.

This case well illustrates Congress's wisdom in entrusting decisions under § 1782 to the district courts rather than enacting a foreign discoverability requirement. In this case, petitioners seek to prevent the Guardians appointed by a Chilean court from compiling the inventory ordered by that court, despite the fact (found by the district court and undisputed by petitioners) that "allowing the depositions to proceed would actually assist the Chilean court in its ongoing proceedings." Pet. App. A24. Petitioners contend (Pet. 15 n.6) that Chile will be "offended" by discovery here, even though, as the district court found (Pet. App. A24), the law of Chile does not prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken. The adverse effects of a foreign discoverability requirement in this and other cases further confirms that such a requirement should not be read into § 1782.

Petitioners urge that the rule adopted by the court below will "impose U.S. procedures capriciously on some but not all parties to the foreign proceeding" and will "unfairly disadvantage U.S. litigants in foreign proceedings." Pet. 4. Those concerns are academic here. Petitioners are not "parties" to or "litigants" in the Chilean incompetency proceeding. In-

deed, petitioners claim to be beyond the jurisdiction of the Chilean courts. The Guardians can hardly be faulted for seeking relevant evidence in the jurisdiction in which the witnesses reside.

5. Even if the Court were inclined to consider whether § 1782 should be read to require a threshold showing of foreign discoverability, resolution of that question would not affect the outcome of this case because the information sought by the Guardians would be discoverable in Chile.[6]

Contrary to petitioners' insinuation (Pet. 15 n.6), the courts below did not endow the Guardians "with powers broader than are given to them by virtue of their appointment in Chile." As the district court found (Pet. App. A23-A24), and as petitioners do not dispute, Article 862 of the Civil Procedure Code of Chile authorizes the Chilean court to issue letters rogatory to inquire about Mr. Gianoli's assets. Thus, Chilean law plainly provides for discovery of the information requested by the Guardians from petitioners. Enforcement of letters rogatory is governed by the laws of the receiving nation (here, the United States), see 22 C.F.R. § 92.67(a), and compulsory process is available under U.S. law.

Even if the foreign discoverability requirement is based entirely on the practice within the foreign juris-

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[5] Although the court of appeals did not rest its decision on this alternative ground, the Guardians pressed the point in the district court (J.A. 410-14) and the court of appeals (Brief for Appellees Silvia Gianoli Aldunate and José Miguel Barriga Gianoli 24-31). The Guardians are entitled to defend the judgment of the court below on any ground raised below, whether relied on by the court or not. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

diction, the Guardians still satisfy the requirement. If petitioners were within the jurisdiction of the Chilean court, and refused to provide testimony and documents, the Guardians would be entitled to compel discovery by means of at least three ancillary proceedings. First, the Guardians could file a proceeding called a "prejudicial measure." Under § 274 of the Chilean Civil Procedure Code, a Chilean court could impose a fine and/or arrest petitioners if they refused to comply with a letter rogatory requesting information to complete the inventory. J.A. 411.

Second, the Guardians could begin an "ordinary proceeding" against petitioners if they were within the jurisdiction of the Chilean court and refused to comply with a letter rogatory. J.A. 412.

Third, the Guardians could obtain discovery from petitioners by means of an accounting. J.A. 412. Petitioners claimed to act as agents of Mr. Gianoli (one petitioner as his attorney and the other as a director of a corporation he founded and beneficially owned). Under Chilean law, when Mr. Gianoli became incompetent, petitioners' agency terminated by operation of law, Chilean Civil Code, Art. 2163(7), and petitioners are required to give an accounting to Mr. Gianoli (and, in his stead, to his Guardians), *id.*, Art. 2155. Thus, it is undisputed that the Guardians could obtain by way of an accounting in Chile precisely the same information they seek from petitioners in Connecticut—assuming, of course, that petitioners were within the jurisdiction of the Chilean court. J.A. 412.[6] Since Chilean law would empower the

[6] Petitioners maintain that an "accounting" is not "discovery." J.A. 412. Although the label is different, the function is the same. Chilean law provides that the subject of Mr. Gianoli's assets is a fit and proper matter for inquiry and

Guardians to obtain testimony and documents from petitioners if they were located in Chile, the judgment below does not turn on whether or not 28 U.S.C. § 1782 implicitly conditions judicial assistance on a showing that discovery could be obtained in the foreign jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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empowers the Guardians to compel production of the information they seek. That satisfies any "discoverability" requirement.

No. 93-513

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: APPLICATION OF
SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN,
AND EDWARD FODEN,

Petitioners,

—v.—

SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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28 U.S.C. § 1782 . . . . . *passim*

IN THE

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OCTOBER TERM, 1993

IN RE: APPLICATION OF
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Respondents.

REPLY TO BRIEF IN OPPOSITION

The decision of the Second Circuit below creates a clear conflict among the circuits that unless swiftly resolved will undermine the fundamental purposes of 28 U.S.C. § 1782, prevent uniform application of federal law and risk damage to the foreign relations of the United States.

1. There is a clear conflict among the circuits.

Although Respondents apparently disagree, the Second Circuit plainly (and correctly) recognized that its decision below creates a direct conflict among the circuits. The court stated, for example, "[t]he Fodens cite First and Eleventh Circuit decisions that explicitly read a discoverability requirement into section 1782 and argue that the reasoning in those decisions is persuasive [citations omitted]. We disagree. * * * We hold that section 1782 does not contain a requirement that the material requested in the

district court be discoverable under the laws of the foreign jurisdiction." (Petition Appendix A13 (footnote omitted); A18-A19.)

Respondents try to obscure this circuit split by arguing that the "tension" between the Second Circuit and the First and Eleventh Circuits "is not *whether* to examine foreign discoverability, but *when*." (Brief in Opposition ("Opp.") at 11 (emphasis in original).) In truth, the issue is not when, but *how* to examine discoverability — by making it merely a factor that courts may in their discretion consider or reject, or by making it a prerequisite test that must be applied to bar discovery in the United States whenever it would be barred in the forum where the foreign proceeding is pending. On this, the circuits take diametrically opposed views.

The foundation of Respondents' attempt to reconcile the various circuit opinions is their position that the "Second Circuit held that foreign discoverability *should* be considered by the district court" in determining whether to grant discovery. (Opp. at 11-12 (emphasis added).) The decision below, however, did not say "should"; it said "may":

> "[D]istrict judges may well find that in appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782. We hold, however, that no such threshold requirement exists in the statute."

(A13.) The use of the word "may" establishes that in the view of the Second Circuit, district courts may consider — and therefore may at their option decline to consider — the question of discoverability. The so-called "tension" between the Second Circuit and the other circuits is thus a true conflict about whether courts may — or must — examine foreign discoverability at all.

Respondents also attempt to reconcile the circuit opinions by stating that the First and Eleventh Circuits focused on "whether" to consider discoverability, while the Second Circuit focused upon "when" to do so, "at the threshold or in the exercise of the court's discretion." (Opp. at 18) This effort at reconciliation also fails because, at heart, the issue is not a temporal one. Whatever standard is applied, the determination of discoverability must obviously be made *prior* to granting U.S. discovery or there is no

use making it at all. Judicial references to a "threshold requirement" (*e.g.*, A13) are not merely references to the timing of the determination. They are intended to distinguish between a bright line rule applied to bar litigants from discovery *at the threshold* and a rule — regardless of when applied — that merely permits discoverability to be weighed (or not weighed) in the discretion of the district court. This is how Petitioners and the Court of Appeals used the term, and how it is used in common parlance. The issue cannot be diminished to one of mere timing by Respondents' *ipse dixit*.

More important than these distinctions in terminology, however, is the fact that the First and Eleventh Circuits ultimately addressed both "whether" *and* "when" — holding that the district courts must determine *whether* the discovery would be available in the foreign jurisdiction and that they must do so at the outset. For example, the Eleventh Circuit held:

> "the district court *must* decide *whether* the evidence would be discoverable in the foreign country *before* granting assistance."

In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar* v. *Minister of Legal Affairs of Trinidad and Tobago*, 488 U.S. 1005 (1989) (emphasis added).

In addition, it is quite clear that if the documents sought in *Trinidad and Tobago* had not been discoverable in the foreign country, the Eleventh Circuit would not have affirmed the district court's grant of discovery. The court's insistence upon satisfaction of the discoverability requirement was thus not "dictum" (Opp. at 19), but a statement of the legal test the court was applying to the facts before it. *See also Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988) ("if the court finds that the evidence is not discoverable, the subpoenas duces tecum are due to be quashed.").

Respondents' attempt to evade the force and reasoning of the First Circuit's decision in *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992), is equally unavailing, and is significantly undermined by the Respondents' own contradiction from one sentence to the next. Respondents first state (accurately) that "[t]he [*Asta Medica*] panel required '*a threshold showing* that

the information would be discoverable in the foreign jurisdiction if located there'" (quoting the First Circuit's decision, 981 F.2d at 6 (emphasis added)), but then claim that "[t]he panel did not focus on whether foreign discoverability should be considered at the threshold or in the exercise of the district court's discretion." (Opp. at 20.) Not only is the latter statement contrary to the former, it is belied by the First Circuit's express statement that the district court's "discretion . . . is limited by the restriction that we find . . . to be implicitly required by section 1782 [*i.e.*, the discoverability requirement], based upon its history, rationale, and the policy considerations we have discussed." 981 F. 2d at 7.

In short, the conflict between the circuits is irreconcilable, as the court below recognized and the plain language of prior opinions confirms.

Analysis of the First and Eleventh Circuit decisions also makes clear that those courts need "no opportunity to reconsider their statements," as Respondents suggest. (Opp. at 20.) These are not ancient or ill-considered judgments. They are recent cases, fully briefed and argued that simply reach a different result on an important issue of statutory interpretation and foreign policy. Respondents concede that if, upon being given an "opportunity to reconsider" their prior decisions "those circuits reject the holding of the Second Circuit, those later decisions will provide an appropriate occasion for this Court's review." (Opp. at 21.) Respondents miss the point; those circuits have already rejected the holding of the Second Circuit. The appropriate occasion for this Court's review is now.[1]

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[1] Respondents try to minimize the split among the circuits by arguing that the Third Circuit's decision in *John Deere, Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985), "requires not a threshold showing of foreign discoverability, but rather the appropriate exercise of the district court's discretion on the facts of a given case." (Opp. at 17.) This is just not so, as was demonstrated in the Petition (at 8-9) and recognized by both the First and Eleventh Circuits, each of which cites *John Deere* as having imposed a discoverability requirement. *See Asta Medica*, 981 F.2d at 6 ("In order to avoid offending foreign tribunals, other courts have established, as *a prerequisite to granting a request for assistance* under Section 1782, a threshold showing that the information would be discoverable in the foreign jurisdiction if located there.") (citing, *inter alia*, *John Deere*, 754 F.2d at 136); *Trinidad and Tobago*, 848 F.2d at 1156.

2. References in legislative history to the use of U.S. discovery procedures do not establish that a discoverability requirement was not intended.

Respondents also oppose certiorari by contending that the Second Circuit's decision is correct, mainly because it is consistent with an interpretation of legislative history offered by Professor Hans Smit. (Opp. at 14-15.) With due respect to Professor Smit, his views do not cure the split among the circuits. Moreover, Smit's writing, and the Senate history to which he refers, are not in point. They merely establish that if matters are discoverable in the foreign forum, the *procedures* used to obtain U.S. discovery can be different ones than the foreign court would permit. For example, if the information could be collected in the foreign forum by compelling production of documents, but could more efficiently be obtained in the U.S. by a deposition, the latter should be permitted. (Opp. at 14.)

This point does not address the true question: whether to permit U.S. *compulsory process* to be used to obtain information in the United States if compulsory process would not be available to obtain such information in the foreign jurisdiction. It is this issue of the use of compulsion on which the circuits are split. And it is this question — whether U.S. courts should have the power, in effect, to intervene and potentially alter the outcome of a foreign proceeding when the foreign court would have no such power — that raises fundamental issues about sovereignty, fairness and the uses of American power. On this issue the Second Circuit has departed radically from the views of its sister courts.

3. The resolution of this circuit split is necessary for the orderly administration of justice.

Respondents' argument that the "foreign discoverability issue is of little practical significance" is based on the erroneous assertion that the "issue has arisen in fewer than half a dozen cases in almost 30 years . . . ." (Opp. at 11.) In the first place, it is impossible to know in how many cases the question has arisen without knowing how often § 1782 applications have been granted after a proper showing of discoverability. For example, in *In re Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), *cert.*

denied, sub nom. United Technologies Int'l, Inc. v. *Malev Hungarian Airlines*, 113 S. Ct. 179 (1992), decided by the Second Circuit on other grounds, the question of whether to impose a discoverability requirement was not faced because, as the court found, the information was discoverable under Hungarian law. 964 F.2d at 100.

Equally important, the federal courts have been required to deal with § 1782 applications in general, and the issue of discoverability in particular, with increasing frequency. Of the more than sixty cases reported on LEXIS concerning § 1782, approximately two-thirds arose in the past ten years, and approximately half arose in the last five years. In at least nine different reported cases since 1988, the issue of discoverability has been presented, either in the context of applying the discoverability requirement, or more generally. Respondents' repeated assertion that "for more than 20 years" the discoverability issue was not a subject of dispute (*e.g.*, Opp. at 11) simply underscores the accelerating pace of decisions in the area. The clear and well-developed split between the Second Circuit and four other circuits on this point — expressed in decisions issued in 1985, 1988, 1989, 1992 and 1993 — alone establishes that this is an issue of practical, and immediate, significance.[2]

4. The policy concerns underlying the discoverability requirement are real and significant.

Respondents characterize the policy concerns underlying the discoverability requirement — the risk of offending foreign sovereigns and thereby undermining § 1782's ultimate purpose of encouraging foreign cooperation in providing discovery; unfairly disadvantaging U.S. litigants in foreign proceedings; and placing an undue burden on the federal courts — as a "parade of horribles" and a "hypothesis" that is "inherently unbelievable." (Opp. at 21.)

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[2] The fact that as recently as the *John Deere* decision in 1985, the federal courts had not resolved the question of whether § 1782 could only be invoked to seek evidence admissible in the foreign court, 754 F.2d 132, 134, explains in part why the discoverability requirement has only recently been pushed to the forefront as the federal courts have had to determine the permissible extent of discovery. (*See* Petition at 10-11.)

Yet Petitioners were not the first to identify these concerns; the Courts of Appeals that imposed the discoverability requirement did so. *See, e.g., Asta Medica*, 981 F.2d at 5-7; *John Deere*, 754 F.2d at 135-37. If these concerns are "inherently unbelievable," it is odd that the Second Circuit is the first court to diverge from the consistent series of decisions holding that the discoverability requirement is necessary to protect against these dangers and to effectuate the purpose of § 1782.

5. The discovery sought would not be available in Chile.

Respondents argue that the discoverability issue is somehow moot because in their view, the information sought is discoverable under Chilean law. (Opp. at 12.) Respondents state that they are "entitled to defend the judgment of the court below on any ground raised below" (Opp. at 24 n.5), and that they "demonstrated in the district court and the court of appeals that the discovery sought would be available to them under the laws of Chile." (Opp. at 12, 24). The cases they cite also require, however, that "the record permit" the alternative ground put forward. *See, e.g., United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). The record here does not permit any such argument.

To support their theory, Respondents attempt to blur the plain distinction between voluntary production of information — which is all they have shown is contemplated in an inventory under Chilean law — and invocation of the compulsory discovery powers of a U.S. court that has no analog under Chilean law. (Opp. at 24.) They then claim that Chilean sovereignty could not possibly be offended by a U.S. court granting Respondents the power to compel production of documents and to compel witnesses to appear to be cross-examined under oath, because in Chile similar information may be produced voluntarily. The one simply does not follow from the other: it is the act of judicial intervention through U.S.-style discovery that creates a distinction not just in degree but in kind from the voluntary information-gathering permitted in the foreign forum.

Respondents have also conceded (in their brief to the Second Circuit to which they cite in their Opposition (at 24 n.5)) that they submitted no proof to support the claim that the discovery sought here would be available to them in Chile through *compulsory*

process for use in the incompetency proceeding — the only proceeding on which they base their application. (Respondents' Brief to the Second Circuit, dated April 12, 1993 ("Resp. 2d Cir. Br.") at 28 n.6.) Respondents also admitted that the district court failed to reach that question (*id.* at 26) and the Second Circuit agreed: "the district court did not make a finding as to the parties' ability to obtain pre-trial discovery under Chilean law . . . ." (A17.)

In other words, Respondents have acknowledged both that the district court failed to rule on discoverability under Chilean law, and, most importantly, that there is no record evidence to support a finding of discoverability. At the least, then, assuming that this Court finds a discoverability requirement, these facts require remand to the district court for a determination of whether the information sought from Petitioners would be discoverable under Chilean law for use in the incompetency proceeding.[3] In the Court of Appeals Respondents explicitly agreed that this is so. (Resp. 2d Cir. Br. at 28-29.) The issue of discoverability is thus not only squarely presented; it cannot be mooted by reliance on other grounds for affirmance of the opinion below.

6. Petitioners would be prejudiced severely by a grant of one-way discovery.

Finally, the concern expressed by the First Circuit in *Asta Medica*, 981 F.2d at 5-6, that the denial of a discoverability requirement will place U.S. litigants in foreign proceedings "at a substantial disadvantage vis-a-vis the foreign party" is not, as Respondents claim, "academic" simply because Petitioners are not parties to the Chilean incompetency proceeding. (Opp. at 23.)

First, in both *Trinidad and Tobago* and *Lo Ka Chun*, the Eleventh Circuit imposed the discoverability requirement on foreign litigants seeking discovery from *non-parties* to the foreign proceedings. 848 F.2d at 1152; 858 F.2d at 1565. The issue of granting one party greater discovery than another by the

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[3] Petitioners presented evidence below demonstrating that compulsory process is not available in Chile to obtain the discovery sought here. (*See generally* Joint Appendix below at J.A. 188-241; 334-363.)

happenstance of a U.S. connection does not depend upon whether a *party* is located in the U.S. but on what discoverable information may be found here.

Second, Respondents' argument ignores what is plain from the opening pages of Respondents' brief to this Court, in which they repeat the main points of their prior vituperative attacks on Ana Eguiguren (Opp. at 3): they are preparing for future litigation against Mrs. Eguiguren and her family, including Petitioner Maria Luisa Foden. Petitioners are thus far from being neutral third party witnesses — they are targets of Respondents' litigation strategy whether or not they are parties in the technical sense to the Chilean proceeding. Respondents thus seek for their own adverserial purposes to compel one-sided discovery that no U.S. court would ever allow in a U.S. proceeding, and that is not permitted in Chile.[4]

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[4] Petitioners have not responded to the false charges made against them in the district court and repeated in the Court of Appeals and this Court. To have done so would, among other things, have provided Respondents with precisely what they sought through their personal attacks upon Petitioners: the production of information to which Respondents are not entitled. Respondents have never submitted any documentary evidence in support of their allegations, but have relied solely on the hearsay affidavit of an "investigator" whom they apparently regard as competent to give opinions on U.S., Chilean and Panamanian law as well as facts he supposedly uncovered. (J.A. 11.) Stripped of their sensational rhetoric and unsupported charges of scandal, Respondents' papers below said nothing more than that Mr. Gianoli may have chosen to involve Petitioners in his financial affairs at a time when he was unquestionably competent to do so. (J.A. 20-29.) True or false, this is wholly irrelevant to whether Respondents properly may use § 1782 to obtain discovery from Petitioners, as well as to the question of whether a writ should be granted to decide these important issues.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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